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Citation of Authorities

—8512

Citation of Statutes

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 338

GROSS INCOME TAX DIVISION, STATE OF INDIANA,

Petitioner,

vs.

EILEEN ELIZABETH STRAUSS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The State of Indiana, by and through its Gross Income Tax Division, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-entitled cause on the 25th day of June, 1948, affirming the judgment of the Circuit Court for the 27th Judicial District of Indiana.

Opinion Below

The opinion of the Indiana Supreme Court in this cause is unreported as yet, but will be found at page 32 of the record herein, and may also be found unofficially reported at 79 N. E. (2d) 103 of the West Reporter System.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sections 1257 and 2101.

The Reasons for Requesting Writ

This cause is one in which a decision of the highest court of the state draws in question the validity of a statute of that state on the ground of its being repugnant to the Constitution of the United States, more particularly Article I, Section 8, in reference to Interstate Commerce; also, for the reason that the Supreme Court of Indiana has decided the above, a federal question of substance not theretofore determined by this Court, and has decided it in a way probably not in accord with the applicable decisions of this Court.

Questions Presented

The questions presented are these:

A. When a farmer raises cattle and/or farm produce generally, and securing transportation facilities, transported such goods into another state and sold them therein—was such activity one of interstate commerce, thus rendering a tax on the income received from such sale, a burden on interstate commerce?

B. Does the prohibition against state regulation of interstate commerce by means of taxation extend to the whole functional area known as the "flow of commerce", or is such prohibition directed against regulation of the traditional intercourse of the commerce itself?

Or, putting the same question in different form:

Is the State to be prevented from levying upon events otherwise taxable because such events occur or exist anywhere in the broad field in which the trend of modern

decisions indicates the Federal Government has the power to legislate, by virtue of the constitutional interstate commerce powers?

C. Does a state tax on gross income received within the State from goods sold out-of-state lay an improper burden on interstate commerce where the tax is properly apportioned in respect to income received from similar transactions within the state?

Summary Statement

This case originated in the Circuit Court for the 27th Judicial District for the State of Indiana. It is a suit by a taxpayer citizen of Indiana seeking to recover sums of money allegedly wrongfully paid, and illegally collected by the Gross Income Tax Division under the statutory taxing act. The act in question and the procedure thereunder, provides that timely petition for refund may be filed with the Gross Income Tax Division for hearing and administrative action thereon; and upon adverse decision, timely suit may be instituted by such an aggrieved taxpayer in the nisi prius courts of the state.

Respondent Strauss instituted such a suit and had judgment. The State of Indiana, Gross Income Tax Division, appealed such decision to the Supreme Court of Indiana, which is the highest court of last resort in the state. Respondent charged, in the original action below, that the imposition of the tax provided under the Gross Income Tax Act of Indiana was unconstitutional in that it was in violation of Article I, Section 8 of the United States Constitution, since it sought to levy a tax on respondent's gross income received from the sale of livestock and/or farm produce in interstate commerce (R. pp. 4, 5, 6).

The petitioner, State of Indiana, below, filed answer maintaining that the acts of respondent, and his transactions,

were not those of interstate commerce, and the taxation of the gross income received therefrom was not within the prohibition of the Interstate Commerce Clause of the United States Constitution (R. p. 9).

Both the trial courts and the Indiana Supreme Court decided the cause in favor of respondent taxpayer (R. p. 10 & p. 38).

The Tax Act in question is the Indiana Gross Income Tax Act of 1933, as amended, Acts of the General Assembly 1933, Chapter 50; Acts 1937, Chapter 117; Acts 1940, Chapter 140; Acts 1941, Chapter 144; also found in Burns' Annotated Indiana Statutes, 1933 Ed., Sec. 64-2601-2632 (1943 Replacement).

This is the same Gross Income Tax Act which has made its appearance in this Court before, but not in the sense that it is called into question by the Indiana Supreme Court decision sought to be reviewed herein.

The goods (cattle and/or farm produce) sold were transported by seller, respondent herein, to the place of sale in another state, with no prior order, no buyer in sight, received and held at the destination with title still in respondent, subject to the control, use, or disposition of taxpayer and/or his agents. The sale which produced the gross income concerned in this cause, then, occurred at a subsequent time and after an elapsed interval, during which buyers were sought and offers solicited (R. pp. 14, 15, 16, 20, 21, 23, 24, 27, 28, 29).

Reasons for Granting Writ

I

THE SUPREME COURT OF INDIANA IN THIS CASE HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT THERETOFORE DETERMINED BY THIS COURT.

II

THE SUPREME COURT OF INDIANA HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

III

THE SUPREME COURT OF INDIANA IN THIS CASE HAS DECIDED AN IMPORTANT QUESTION OF STATE AND FEDERAL LAW IN A WAY THAT IS UNTENABLE.

IV

THE SUPREME COURT OF INDIANA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED IN THIS COURT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Supreme Court of Indiana in This Case Has Decided a Federal Question of Substance Not Theretofore Determined by This Court.

Is a state prohibited from taxing events which may be subject to Congressional legislation under the interstate commerce powers? The Indiana Supreme Court has so stated. (R. p. 32.) Petitioner seeks a reversal of such a holding: Where a taxpayer transported property to a market in another state and there, without prior order, sought a buyer and subsequently, on finding a buyer, effected a sale of the property; were the gross receipts from such sale, after transportation, sales costs and commissions were deducted, exempt from taxation by the state of taxpayer's residence as gross income received from interstate commerce? The Indiana Supreme Court decided in the affirmative. Petitioner contends the answer should be in the negative.

This court has previously held that gross receipts are exempted from the incidence of Indiana's Gross Income Tax Law where the goods were manufactured or produced for sale in interstate commerce and there sold and delivered interstate on prior order.

J. D. Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307; 82 L. ed. 1365;

International Harvester Co. v. *Dept. of Treasury* (1944), 322 U. S. 340; 88 L. ed. 1313.

Also, it has been held that property (stock certificates) sold in another state through an exchange, and delivered interstate pursuant to prior order, created a transaction,

the gross receipts from which are income from interstate commerce within the protection of Article I, Section 8, of the United States Constitution.

Freeman v. *Hewit* (1946), 329 U. S. 249; 91 L. ed. 265.

This Court has not decided the question of the taxability by a state of gross income received by a resident taxpayer who transported his goods to an out-of-state market, and after depositing them there, elected to make a sale which produced such income.

Petitioner urges this Court that such question is of paramount importance to the future as well as present administration of its taxing powers.

II

The Supreme Court of Indiana Has Decided a Federal Question of Substance in a Way Probably Not in Accord With the Applicable Decisions of This Court.

In often repeated statements, this Court has held that interstate commerce is terminated when the interstate movement has ended and the goods have come to rest at their destination, and that subsequent transactions are local events which will support otherwise valid state or local taxes.

Bacon v. *Illinois* (1913) 227 U. S. 504; 57 L. ed. 615;
Liggett v. *Lee* (1933) 288 U. S. 517; 77 L. ed. 929;
Minnesota v. *Blasius* (1933) 290 U. S. 1; 78 L. ed. 131;
Wiloil Corp. v. *Pennsylvania* (1935) 294 U. S. 169; 79 L. ed. 838;
Caskey Baking Co. v. *Virginia* (1941) 313 U. S. 117; 85 L. ed. 1223.

Numerous decisions of this Court define an area of interstate commerce for the purpose of supporting or limiting

the power of Congress to legislate in the discharge of its function of federal regulation. Such decisions tend to create an area aptly described as the "current of commerce," or the "flow of commerce", and serve to extend the powers of the Federal government over a wide range not substantially a part of the limited field commonly understood under the term "interstate commerce" as technically defined.

> *United States* v. *Sullivan* (1948), 68 Sup. Ct. 331; 92 L. ed. 305;
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> *N.L.R.B.* v. *Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1; 81 L. ed. 893;
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> *Chicago Board of Trade* v. *Olsen* (1923) 262 U. S. 1; 67 L. ed. 839;
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> *Stafford* v. *Wallace* (1922) 258 U. S. 495; 66 L. Ed. 735;
>
> *Swift & Co* v. *United States* (1905) 196 U. S. 375; 49 L. Ed. 518.

In *Chicago Board of Trade* v. *Olsen* (1922) 262 U. S. 1, 67 L. Ed. 839, the power of Congress to regulate was upheld in the trading of grain futures, where no actual interstate movement was contemplated. In *United States* v. *Sullivan* (1948), 68 Sup. Crt. 331, 92 L. Ed. (Adv.) 305, the efficacy of Congressional regulation was upheld at a time months after the interstate movement had ended. In *NLRB.* v. *Jones & Laughlin Steel Corp.,* (1937) 301 U. S. 1, 81 L. Ed. 893, a purely local event concerning employment and employee relations, was held subject to legislation. In all these cases the impact of the legislation concerned was placed at a point far before or behind any activity traditionally defined as interstate commerce, but the legislation was sustained on the ground of the power of Congress to legislate in areas of the "flow of commerce" because events in those areas do affect, or have the power to affect, interstate commerce itself.

However, when one comes to the question of prohibitions against the states placing a burden on commerce, the constitutional prohibitions contained in Article I, Section 8 of the United States Constitution, are found tc apply to interstate commerce itself as traditionally and technically defined. In *Minnesota* v. *Blasius* (1933) 290 U. S. 1, 78 L. Ed. 131, a local tax on cattle was sustained though the cattle stood at the time in the stockyards, which place, and the cattle themselves, were doubtless subject to various forms of Federal regulation under the power of Congress to legislate in areas which "affect commerce." Similar results have been reached in several decisions of this Court which stand as guiding law in such matters.

Caskey Baking Co. v. *Virginia* (1941) 313 U. S. 117; 85 L. ed. 1223;

Wiloil Corp v. *Pennsylvania* (1935) 294 U. S. 169; 79 L. ed. 838.

The prohibitions against state taxation of gross income received from interstate commerce found in Article I, Section 8, do not, apparently, and should not, extend to all events and transactions found in the areas "affecting commerce." The several decisions of this Court strongly indicate that such events are within the sphere of constitutionally valid state taxation. The decision of the Indiana Supreme Court below extends the constitutional prohibition as a barrier between the state's power to tax and all events or transactions which are now, or any in the future be, within the areas which affect commerce. It would seem from the opinion of the Indiana Supreme Court, that wherever the Congress may legislate, the state may not tax. Petitioner submits that such a theory is contrary to all legal concepts on which our Federal institutions are based, and that such a decision should not be permitted to stand.

III

The Supreme Court of Indiana in This Case Has Decided an Important Question of State and Federal Law in a Way That Is Untenable.

The existence of the states is still a necessary element of our federalism, and where the exercise of a state's functions can be constitutionally upheld this Court will support and defend that state's existence. Such discharge of its duty by this Court has ample historic background.

> "* * * the preservation of the States, and the maintenance of their governments, are as much withhin the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."
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> *Texas* v. *White* (1869), 7 Wall. 700, 725; 74 U. S. 227.
>
> See also *Collector* v. *Day* (1871), 11 Wall. 113, 124; 78 U. S. 122.

The limitations on Indiana's power to obtain revenue from its Gross Income Tax have been adequately delineated in previous decisions of this Court. A far reaching prohibition as extensive as that laid down in the decision and opinion of the Court below in this cause would strike a most serious blow to the financial competence of the states. The Indiana Supreme Court's interpretation of the previous decisions of this Court is erroneous in its import and its review is most vital.

IV

The Supreme Court of Indiana Has Decided an Important Question of Federal Law Which Should Be Settled by This Court.

A

A state tax touching interstate commerce is not necessarily an unconstitutional burden thereon

For a long duration the decisions of this Court upheld previously laid down prohibitions against the attempts of the states to tax instrumentalities and functionaries of the Federal government and, likewise, taxation by the Federal government of state instrumentalities. With two governments having authority within the same territory, the power of either to cripple the other's operations needed restriction. Such conditions were the background for the origin of the theoretical pronouncement that "the power to tax is the power to destroy."

McCulloch v. *Maryland* (1819) 4 Wheat. 316, 431; 4 L. ed. 579;
Weston v. *Charleston* (1829) 2 Pet. 449, 472, 473; 7 L. ed. 481, 489, 490;
Dobbins v. *Erie County* (1842) 16 Pet. 435; 10 L. ed. 1022.

Growing financial needs of the respective governments created a pressure under which the decisions conferring such broad and reciprocal immunities received constant review and dissent. That the need for protection of the state and/or the Federal government from the destruction or crippling effect of each other's taxing power required respective total immunity, is no longer the law.

Graves v. *New York* (1939) 306 U. S. 466; 83 L. ed. 927;
Helvering v. *Gerhardt* (1938) 304 U. S. 405; 82 L. ed. 1427,

and the mandate of this court with the facts of each case in view, can protect against a possible destructive tax or permit an otherwise valid tax, non-destructive in fact. The power to tax is no longer the power to destroy.

> *Panhandle Oil Co.* v. *Mississippi, etc.* (1928) 277 U. S. 218, 223, 224; 72 L. ed. 857, 859 (dissent)

The prohibitions implicit in Article I, Section 8 of the United States Constitution are likewise for the protection of a co-existing government from destructive action; thus through the supremacy of the Federal government in its sphere of power over interstate commerce, the Federal union is much more secure. Interstate commerce must be protected from burdens laid on it by the states, but questions concerning burdens on interstate commerce are, in the last resort, practical questions calling for acute judicial delineation under the particular facts of a particular case.

Is there truly a practical distinction between the questions underlying the protection against a state's taxing power being used to cripple or destroy the Federal government's power to function in a particular respect, and the questions underlying the protection against a state's taxing power being used to burden interstate commerce, an area under Federal sovereignty?

> "* * * even if it be found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry whether a particular assertion of power by a state over such transactions offends the Commerce Clause."
>
> *Central Greyhound Lines* v. *Mealey* (1948) (October Term 1947) 68 S. Ct. 1260, 1265; 92 L. ed. (Adv.) 1235, 1237.

Petitioner submits that the decision of the Court below turns on the finding that interstate commerce was involved. While submitting that the taxable event below was a local

event, petitioner urges that likewise, under the above considerations, this cause should be briefed and heard by this Court, and it be determined whether or not, in the instant case, the incidence of the Indiana Gross Income Tax Law places an unlawful burden on the transactions in question.

B

The Impact of the tax in this instance bears correct apportionment to interstate commerce

In the instant case, the tax was assessed on the income received by the taxpayer. Uncontradicted evidence below showed that the income received by respondent was forwarded to him in Indiana by an agent, transportation, sale costs, storage charges, etc. deducted. (R. pp. 3, 4, 14, 15, 16, 25) Such income when received by respondent was actually the net amount remaining after the deduction of forwarding charges commissions, sales expense, etc. (R. pp. 3, 4, 14, 15, 16, 25) The impact of the tax was not on "gross income received from interstate commerce", but for all actual and practical purposes, was only on the net value of taxpayer respondent's goods after the expenses of any out-of-state interstate activities had been deducted. Therefore, a tax levied on the gross income of respondent received by her in the taxing state, which income included receipts from the sale of farm produce as set forth in the record, was not a discriminatory or burdensome tax upon interstate commerce. Such particular receipts lay within respondent's gross income along with receipts from other sources. The effect of any incidence the tax may have upon the part of respondent's income received from the sales in question places no conceivable, practical burden on interstate commerce.

Petitioner submits that in the facts shown by the record in this case, no rationally drawn distinction within practical

consideration would lead one to the conclusion that petitioner taxing state is asserting a power over such a transaction which offends the Commerce Clause. If it should be argued that improper apportionment found discriminatory under a tax levy on Interstate Commerce is unlawful, petitioner urges that in this instance, the complaint, if any, lies more practically with that of petitioner's intrastate activities since the impact of the gross income tax on his sales out-of-state is only on the apportioned activities of the taxpayer within the State of Indiana, and omits from the tax paid portions of the income allocated to the cost of making these sales, in another jurisdiction.

C

By practical distinction the sales activities of respondent taxpayer at issue were local events; no others were taxed

The first characterization of this tax was the Supreme Court of Indiana as an excise levied upon those domiciled within the state or who derived income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state.

Miles v. *Dept. of Treasury* (1935) 209 Ind. 172, 188; 199 N.E. 372;

Storen v. *J. D. Adams Mfg. Co.* (1937) 212 Ind. 343; 351; 7 N.E. (2d) 941.

Further interpretation of this statute by the Indiana Supreme Court as to the basis of this tax are omitted as they were compelled by the decisions of this Court and are the adoption of this Court's reasoning rather than the independent interpretation of an Indiana court of its own statute.

Ignoring the rule that this court will ordinarily accept the state court's interpretation of its own law as to the nature and incidence of the tax.

***Memphis Natural Gas Co.* v. *Stone* (1948) 68 S. Ct. 1475, 1478; 92 L. ed. 1409, and cases cited (N. 16);**

***General Trading Co.* v. *State Tax Comm.* (1944) 322 U. S. 335, 337; 88 L. ed. 1309,**

This court held that this tax is not an excise for the privilege of domicile alone but was a tax upon gross receipts from commerce. The Court there struck down the tax because it was levied indiscriminately upon both the intrastate activities (manufacturing) and interstate commerce (interstate sales).

J. D. Adams Mfg. Co. v. *Storen* (1935), 304 U. S. 307; 82 L. ed. 1365.

It is thus recognized that this tax is levied upon a congeries of activities which may vary in each case according to the particular state of facts to which the tax is to be applied. Thus, in many cases the tax is levied upon gross receipts of non-commercial activities such as subsidies (Regulation 1821); winnings at gambling (Regulation 1812); damages for personal injuries or property damage (Regulation 1808); or prizes or premiums (Regulation 1818). Regulations cited may be found in Appendix A herein, *post*.

This Court's characterization of the tax as one on gross receipts from commerce would certainly not fit those situations. That generalized statement was applied to and limited by the congeries of taxable activities in that particular case which included indiscriminately and without apportionment certain activities in interstate commerce. It is conditioned upon such a congeries of fact and cannot well be applied indiscriminately in an area of "nice distinctions."

Memphis Natural Gas Co. v. *Stone* (1948) 68 S. Ct. 1475, 1478; 92 L. ed. 1409;

Central Greyhound Lines v. *Mealey* (1948) 68 S. Ct. 1260, 1265; 92 L. ed. (Adv.) 1235, 1237.

Nor has the Court applied this definition of the tax without a nice regard for the interstate and intrastate aspects of the particular aggregate of taxable activities presented by each case. It has sustained or denied the tax consistently with the presence or absence of interstate commerce in the cumulation of taxable activities and has refused to strike down the tax merely because interstate commerce was present in the totality of both taxable and non-taxable activities.

Thus in—

J. D. Adams Mfg. Co. v. *Storen* (1938) 304 U. S. 307; 82 L. ed. 1365, and

Freeman v. *Hewit* (1946) 329 U. S. 249; 91 L. ed. 265,

the taxable activities were held to include interstate sales while in other cases involving this tax, the cumulation of taxable events was held not to include the interstate commerce present in the facts. See:

Dept. of Treasury v. *Wood Preserving Co.* (1941) 313 U. S. 62; 85 L. ed. 1188;

Dept. of Treasury v. *Ingram-Richardson Mfg. Co.* (1941) 313 U. S. 252; 85 L. ed. 1313;

Dept. of Treasury v. *Allied Mills* (1942) 220 Ind. 340; Aff'd. 1943; 318 U. S. 740; 87 L. ed. 1120;

Great Lakes Dredge & Dock et al. v. *Dept of Treasury* (1943) 133 Fed. (2d) 212. Certiorari denied, 320 *U. S.* 746;

International Harvester Co. v. *Dept. of Treasury* (1944) 322 U. S. 340; 38 L. ed. 1313.

It is, therefore, necessary to analyze the facts and segregate the congeries of activities upon which Indiana seeks to levy its tax. The taxing act (Section 1 (m), Appendix B, *post*) defines taxable income for the purposes of this case as:

"* * * the gross receipts of the taxpayer received from trades, businesses or commerce, * * * and the gross receipts received from the sale, transfer, or exchange of property, tangible or intangible, real or personal, * * *."

The facts in this case disclose that the respondent engaged in the business of farming, shipped the products thereof to market and after the arrival at market, offered them for sale and sold them. That the local business of production is at least a part of the tax base is specified in the statute and is implicit in the decision in *J. D. Adams Mfg. Co.* v. *Storen* (1938) 304 U. S. 307; 82 L. Ed. 1365, where the court held directly that the tax was upon both the local activity of manufacturing and the interstate sale and struck down the tax because of the failure to apportion between them.

The distinction between this case and the *J. D. Adams Mfg. Co.* is that in that case the interstate sale occurred partially within Indiana in that acceptance of the contract and delivery of the goods to the carrier occurred within the state and the interstate sale was thus within the jurisdiction of Indiana to levy the tax. Here, as is elsewhere shown, the sale was wholly extra-state and no part of it occurred in Indiana. The sales were negotiated, contracted, and consummated by delivery entirely outside the state.

In its opinion below, the Court held the tax invalid solely on the basis of a burden on interstate commerce and otherwise affirmed the tax (R. p. 32).

The affirmation of the validity of the tax (aside from the Commerce Clause) could only have been founded upon the premise that the tax was an excise upon the privilege of local domicile or was a tax upon the privilege of receiving gross income from the local business of farming. The Indiana court, however, expressly disaffirmed the former premise and approved the latter by necessary implication. The only activity within the jurisdiction of Indiana and

upon which the court could have based the validity of the tax was the business of farming in Indiana.

In this respect, the present case is similar to *Department of Treasury* v. *Ingram-Richardson Mfg. Co.* (1941) 313 U. S. 252; 85 L. ed. 1313, where the taxpayer was in the business of enameling stove parts in Indiana. These parts were received in Illinois, transported by the taxpayer to its plant in Indiana, redelivered by the taxpayer to the customer in Illinois after being enameled. The single compensation covered both the transportation and the enameling. This Court held that the tax was levied upon the gross receipts from the local business of enameling and that the interstate transportation was merely incidental to that business.

Here, as there, the taxpayer was engaged in a local intrastate business. Here, as there, there was an incidental transportation of the product outside the state. While there was here a local sale of goods in another state, no tax was levied with respect to such sale, but the tax was levied in the alternative upon income received within the state and produced by a local event.

Another proof of the fact that the tax was levied in the instant case upon the respondent's business of farming is that if that business had been located outside the taxing jurisdiction of the state, no tax would have been levied. The definition of gross income specifically excludes receipts from a business having a business situs outside the state. (Section 1 (m), Appendix B, *post.*)

Under this statute it is specifically provided by regulation that the operation of a farm in another state constitutes a business situs for the purpose of exempting the income from that farm from taxation.

Regulation 4100, Rule 4, of the Gross Income Tax Division, is as follows:

"RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in a state other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term "engaged in business."

Therefore, the single definitive event which determines the taxability or non-taxability of the gross receipts in this case, is the operation of a farm in Indiana. The manner by which those receipts are realized, whether by sales of product, rental, subsidies, or otherwise is wholly extraneous to the determination of liability. Likewise, the place where these receipts are realized is not determinative of liability. Liability is fixed by statute solely by reason of the operation of the farm in Indiana and is measured by receipts from that operation wherever and however realized.

This case then falls within *American Mfg. Co.* v. *St. Louis* (1919) 250 U. S. 459; 63 L. ed. 1084. See also: *Utah P. & L. Co.* v. *Pfost*, (1932) 286 U. S. 165; 76 L. ed. 1038; *Memphis Natural Gas Co.* v. *Stone* (1948) 68 S. Ct. 1475; 92 L. ed. 1409, where the tax was likewise levied upon a local producing activity and was measured by the gross receipts of that activity.

The respondent's business of farming is carried on in the State of Indiana. It is protected by the laws of this state and served by its agencies. The gross receipts derived from that business are a fair measure of the extent of the activity and thus of the service and protection afforded to the respondent. No other state can tax that activity and Indiana does not seek to tax that activity if carried on in another state. How, then, can this be a tax on, or a regulation of, interstate commerce?

Conclusion

Petitioner respectfully requests the granting of its petition for Writ of Certiorari and a review by this Court of the decision and judgment of the Indiana Supreme Court since the Indiana Supreme Court has held that the gross income tax of the State of Indiana, in the instant case, places an unlawful burden on Interstate Commerce engaged in by respondent taxpayer. Petitioner earnestly submits that the decision of the Indiana Supreme Court is erroneous for the reasons that:

1. Respondent taxpayer was not engaged in Interstate Commerce while participating in the event which produced the income taxed;

2. The transactions which earned the income sought to be taxed were purely local events either in the foreign state where the income producing sales were transacted, or in the state of the taxpayer's residence, that of petitioner;

3. If interstate commerce may be found to be a part of the transactions in question, the impact of the Indiana Gross Income Tax on such transactions does not create a burden which offends the Commerce Clause.

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APPENDIX A

Indiana Gross Income Regulations Cited

Regulation 1808: Damages.

Money received in settlement of property damage will not be taxable to the extent of the amounts used for replacement within a reasonable length of time, but any amounts not so used must be reported as taxable gross income for taxation at the rate of 1%. (Reg. 2100.)

The entire amount of personal damages or awards either on suit or by compromise or voluntary settlement will be considered taxable gross income and must be included for taxation at the rate of 1%, unless this tax has already been paid by a fiduciary.

Regulation 1812: Gambling.

Money received on account of wager or games of chance will be considered taxable gross income and must be reported for taxation without any reduction on account of losses incurred.

Regulation 1818: Prize Premiums.

Prizes and premiums are named as items of taxable gross income in Sec. 1 (m) and the rate applicable is 1% as "income derived from any source whatsoever" —Sec. 3 (g). The cost of prizes and premiums may be deducted from gross income by the donor.

Regulation 1821. Subsidies.

Subsidies paid to producers and processors by the United States Government under price stabilization plans are considered as income "from any source whatsoever" and taxable at the rate of 1%. Persons receiving such subsidies as agents for the final recipient will not be required to pay tax thereon. Subsidies cannot be considered as gifts, nor as a part of the sale price of produce or processed products.

APPENDIX B

Indiana Gross Income Tax Act—Section 1 (m)

The term "gross income," except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, including but not in limitation thereof, wages, bonuses, pensions, salaries, fees, commissions, gratuities, (including the value of living expenses and/or rental of quarters furnished to the taxpayer) and the gross receipts of the taxpayer received from trades, businesses, or commerce, including admission fees or charges, and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets, or from the assignment or sale of rights, all receipts received from the performance of contracts, all receipts received as prizes and premiums, all receipts received from insurance, all amounts received as alimony, damages, or judgments, and all receipts received by reason of the investment of capital, including but not in limitation thereof, interest, discounts, rentals, royalties, dividends, fees, commissions, and receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations, and all other receipts of any kind or character received from any source whatsoever, and without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character: Provided, however, That the term "gross income" shall not include cash discounts allowed and taken on sales; goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the receipt of borrowed money, nor the receipt of the repayment thereof, including the receipts from the issuance of bonds or from the redemption thereof; nor judgments for income not taxable under this act; nor amounts received as withdrawal of deposits

so far as they constitute the principal thereof; nor the amounts received by the taxpayer as outright gifts, devises or bequests, but only so far as such amounts represent the corpus of such gifts, devises or bequests; nor the receipt of capital by a corporation, partnership, firm or joint venture, from sale of stock or shares in such corporation, partnership, firm, or joint venture, or contributions to the capital thereof, but proceeds accruing, or proceeding from subsequent transactions in the stock of such corporation or organizations, or in the interest or shares of the members of any organization shall be included in gross income as defined herein: Provided, further, That the term "gross income" shall not include the gross receipts represented by the value of real or tangible personal property received in reciprocal exchange for real or tangible personal property of like kind by and between the owners thereof, to the extent of the value of the property or the interest therein of which title is surrendered; nor the gross receipts represented by the value of stock of a corporation or association received in a reciprocal exchange by and between the owners thereof (including the issuing corporation or association) for stock in the same corporation or association to the extent of the value of such stock or the interest therein of which title is surrendered; nor the gross receipts represented by the value of bonds or similar securities issued by any corporation or association, received in a reciprocal exchange by and between the owners thereof, (including the issuing corporation or association) for bonds or similar securities issued by the same corporation or association, to the extent of the value of such bonds or similar securities or the interest therein of which title is surrendered; nor the gross receipts represented by the value of stocks, bonds, or other securities received in a reciprocal exchange by and between the owners thereof for other stocks, bonds, or other securities or the interest therein of which title is surrendered, where such exchange is made in the course of a consolidation, merger, or other reorganization, and the stocks, bonds, or other securities received in exchange are issued by one or more corporations or associations each of which is a party to such reorganiza-

tion. The term "exchange" for the purpose of the foregoing proviso means and includes the transfer of title and/or ownership by means of a transaction involving the barter or swap of property acquired previously to the exchange, by and between the owners thereof, with or without additional consideration. "Exchange" shall not be construed to mean or include any sale of property even though other property of any kind is purchased with the proceeds of such sale, nor shall it be construed to mean or include any barter or swap of property where there are more than two parties to the transaction, nor shall the term include any transaction where the property exchanged is acquired by one party to the transaction as a result of negotiation or arrangement with the other party with intent to effectuate an exchange of the property so acquired "Like kind" as used herein shall mean and include only property of the same class and kind, and shall have no reference to the grade or quality of such property. Provided, further, That "gross income" shall not include any amount received as payment of the principal amount of a note taken in lieu of cash if either the face value of such note has been included in taxable gross income at the time of acceptance, or the note was taken prior to May 1, 1933, or is a renewal thereof, but the receipt of interest payments on such note shall be included: Provided, further, That the face amount of a promissory note or retail installment contract, except so much thereof as represents insurance premiums or finance charges as defined in section 1 of the Retail Installment Sales Act of Indiana, derived from either (1) a sale of tangible personal property in the usual course of business of a retail merchant, or (2) the performance of a contract involving the sale or the furnishing of tangible personal property together with labor or services related thereto, or, (3) the maintenance and repair of automobiles, trucks, tractors, trailers, farm machinery or parts thereof, shall be included in Gross Income and returned under the applicable classification of section 3 hereof; and any amount received in payment of, or from the sale of, such promissory note or Retail Installment contract shall not be included in Gross Income, but so much of said note or Retail Installment contract as represents a finance charge as defined above shall

be included in Gross Income if any when collected. Provided, further, That in case of consignment sales "gross income" shall include the gross receipts from the sale of goods sold on consignment and the tax shall be paid thereon by the consignee: Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term "gross income" shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto (including the disposal of capital assets or other properties which had been theretofore acquired or used in carrying on such trade or business): Provided, further, That it is not the intention by the foregoing language to exclude from the definition of "gross income" any receipts of a taxpayer received as interest or dividends, or from sales, or other receipts received from investments, which investments were acquired and/or disposed of other than in connection with the business in which such taxpayer is regularly engaged, nor shall this exclusion be construed as applying to salaries, wages, bonuses, commissions, or other personal remuneration of any kind or character received by any taxpayer.